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REDACTED – FOR PUBLIC INSPECTION

November 10, 2016

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143; *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247; *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593

Dear Ms. Dortch:

CenturyLink, Inc. ("CenturyLink") herein addresses claims made in several recent filings by those proposing expansive and comprehensive regulation of the business data services ("BDS") marketplace.

The record reflects widespread competition for offerings at and below 50 Mbps. There is no basis for INCOMPAS's claim that regulation is required "at the very least" for all services at "50 Mbps or below."[1] As CenturyLink has previously explained, there is expansive record evidence demonstrating that the marketplace for these offerings is competitive in many geographic areas and that, in these areas, price-cap regulation is unnecessary and indeed harmful.[2] Dr. Rysman found that circuit-based services accounted for 42 percent of competitive providers' BDS revenues,[3] and that competitive providers earned about 38 percent of circuit-

[1] Letter from Angie Kronenberg, Chief Advocate & General Counsel, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 2 (filed Oct. 13, 2016).

[2] *See* Letter from Jeffrey S. Lanning, Vice President of Federal Regulatory Affairs, CenturyLink, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 2-3 (filed Oct. 5, 2016).

[3] Marc Rysman, *Empirics of Business Data Services*, White Paper, at 7, Apr. 2016 (rev. June 2016).

based BDS revenues[4] – a far cry from the "zero percent" some are asking the Commission to presume here. The Commission's own regression analyses, though plagued by data collection and economic modeling flaws that *understate* competition, demonstrate that no provider exerts market power in the provision of sub-45 Mbps bandwidth services.[5] Analysis conducted by Drs. Israel, Rubinfeld, and Woroch demonstrates that 55 percent of CenturyLink's aggregate bandwidth for sub-50 Mbps services (and 59 percent of AT&T's) is in buildings that have two or more competitors in the building or within 1,000 feet.[6] Fully 88 percent of CenturyLink's sub-50 Mbps bandwidth is within a half mile of competitive fiber.[7] The Commission's data set also shows that there are census blocks in almost every MSA in which a CLEC provides service, but no ILEC does.[8] In fact, the FNPRM itself observes that CLECs are the only suppliers of BDS in about 13 percent of census blocks.[9]

Submissions by providers confirm these econometric analyses. CenturyLink has submitted evidence along with others showing that nearly ubiquitous cable broadband facilities are robust and relevant substitutes for low-bandwidth ILEC BDS offerings.[10] As Verizon explained in the context of its pending acquisition of XO Communications, "TDM-based DS1 and DS3 services … compete with EoC," and EoC competes "to a significant extent" with other "media," including fiber, "the HFC networks that cable operators have deployed," and fixed

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[4] *Id.*

[5] *See* Mark Israel, Daniel Rubinfeld, and Glenn Woroch, *Analysis of the Regressions and Other Data Relied Upon in the Business Data Services FNPRM and a Proposed Competitive Market Test, Second White Paper*, at 26 (June 28, 2016) ("Second IRW White Paper"), attached to Letter from Glen Woroch, Senior Consultant, Compass Lexecon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 *et al.* (filed June 28, 2016); Declaration of John W. Mayo ¶¶ 71-76 (June 28, 2016), attached as Exhibit B to the Comments of Comcast Corp., WC Docket Nos. 16-143 *et al.* (filed June 28, 2016).

[6] *See* Second Supplemental Declaration of Mark Israel, Daniel Rubinfeld and Glenn Woroch, at 9-10 (Apr. 20, 2016), attached to Letter from Christopher Shenk, Sidley Austin LLP, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 (filed Apr. 20, 2016).

[7] *See* Second IRW White Paper at 5.

[8] Mark Israel, Daniel Rubinfeld, & Glen Woroch, *Competitive Analysis of the FCC's Special Access Data Collection*, at 17 (Jan. 27, 2016) ("Initial Econometric Analysis").

[9] *See, e.g.*, *Business Data Services in an Internet Protocol Environment*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, 4801 ¶ 182 (2016) ("*FNPRM*").

[10] *See, e.g.*, Joint Reply Comments of CenturyLink, Inc. *et al.*, WC Docket Nos. 16-143 *et al.*, at 39-41 (filed Aug. 9, 2016) ("Mid-Size ILEC Reply Comments"); *see also* Letter from Eric J. Branfman, Counsel, Wilshire Connection, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 2 (filed Aug. 25, 2016) ("Wilcon does not see materially less competition in the areas it serves at lower bandwidths (i.e., below 50 Mbps)"); Joint Reply Comments of Lumos Networks Corp. *et al.*, WC Docket Nos. 16-143 *et al.*, at 12 (filed Aug. 9, 2016) (noting that "[a]pproximately 40 percent of the circuits provided by [competitive fiber provider] Lightower are at 50 Mbps or less").

wireless.[11] AT&T has submitted evidence that "ninety percent of [its] sub-50 Mbps bandwidth is within a half mile of competitive fiber," meaning that "CLECs not only have the facilities to compete for all BDS demand, but have been quite successful in winning business" in such markets.[12] In short, there is no basis for assuming the absence of competition for services at and below 50 Mbps.

The Commission must reject efforts to apply benchmarking requirements to Ethernet rates. The notion that the Commission should adopt some sort of "benchmarking" system to regulate Ethernet rates – or explore doing so in a further notice – should, by this point in the proceeding, be a non-starter. Parties that continue to insist that the Commission set rate benchmarks to re-regulate ILEC-provisioned Ethernet services demonstrate stubborn indifference to strong evidence of a competitive Ethernet market and the severe harms that this would inflict on broadband investment and deployment, particularly in rural areas.[13] Much of the record concerning the numerous flaws in the CLECs' benchmarking proposals is already complete, and thus only briefly recapped below.[14]

The robust competition that characterizes the market for Ethernet services is well documented in this proceeding. As CenturyLink and others have explained at length, the record demonstrates that the Ethernet marketplace is highly competitive for all speeds, as competitors have deployed high-capacity facilities in virtually every census block with BDS demand and thereby fueled the migration from legacy TDM-based services to all-IP networks.[15] As a result, CenturyLink has seen its metro Ethernet market share within its own legacy ILEC footprint decline from **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** percent to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** percent from the fourth quarter of 2014 to

[11] *Verizon-XO Transaction: Whitepaper on the effect of Verizon's XO acquisition on business data services*, at 8, 20 (Aug. 1, 201[6]), attached to Letter from Katherine R. Saunders, Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-70 (filed Aug. 26, 2016); *see also id.* at 18-19 (stating that Verizon's pricing for lower-speed BDS services is constrained by "competition from fiber providers, cable providers, and other CLECs offering copper-based services").

[12] Reply Comments of AT&T Inc., WC Docket Nos. 16-143 *et al.*, at 3 (filed Aug. 9, 2016) ("AT&T Reply Comments").

[13] Letter from Jennie Chanda, VP – Public Policy & Strategy, Windstream Services LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 10-11 (filed Oct. 17, 2016) ("Windstream Oct. 17 Letter"); *see also* Letter from Paul Margie, Harris, Wiltshire & Grannis LLP, Counsel to Sprint Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, Attach. at 11 (filed Oct. 14, 2016) (urging the Commission to seek comment on a "benchmark system based on TDM rates" in a further notice).

[14] *See generally* Letter from Russell P. Hanser & Brian W. Murray, Wilkinson Barker Knauer, LLP, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 2-7 (filed Sept. 30, 2016) ("CenturyLink Sept. 30 Letter").

[15] *See, e.g.*, Joint Comments of CenturyLink, Inc. *et al.*, WC Docket Nos. 16-143 *et al.*, at 20-25 (filed June 28, 2016) ("Mid-Size ILEC Comments"); Second IRW White Paper at 24-26; Initial Econometric Analysis at Table C.

the third quarter of 2016.[16] In the same time period, the cable MSO market share within CenturyLink's footprint increased from **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** percent.[17]

The predictable result of this nearly ubiquitous BDS competition has been prices that have fallen rapidly even as ILEC unit costs have risen.[18] Ironically, some CLECs have acknowledged the existence of this competition (perhaps inadvertently) even as they insist on rate regulation. For instance, Sprint's complaints about Ethernet pricing in select areas are based on a comparison of rates offered by the ILEC in select areas and Sprint's competitive options.[19]

Consistent with this substantial evidence, the Fact Sheet appears to recognize (at least implicitly) that Ethernet services are competitive. For instance, it notes an intention to level the playing field for packet-based BDS providers by granting uniform forbearance from portions of Title II, including dominant carrier and tariffing requirements.[20] While the Fact Sheet has its share of problems (which CenturyLink and others have detailed),[21] its apparent resistance to the CLEC-proffered temptation to adopt *ex ante* pricing regulation of Ethernet rates is a rare bright spot.

Moreover, CLECs seeking to subject Ethernet to such *ex ante* regulation continue to ignore the devastating impacts that their benchmarking schemes would have on investment, jobs, and broadband deployment in some of the most challenging to serve territories in the country. The CLECs have tried to divert attention from these harms by claiming that the use of a

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[16] *See* TNS Business Wave 4Q2014 to 3Q2016 Metro Ethernet provider market share by customer count within CenturyLink's ILEC footprint, attached hereto as Exhibit 1. These figures resulted from a study conducted by TNS through telephone surveys of small, medium, and enterprise business customers. It was initially based on TNS's quarterly surveys in 2015 used to generate its Business Wave Surveys, which are provided by subscription to CenturyLink and other providers for business purposes.

[17] *Id.*

[18] Mid-Size ILEC Reply Comments at 9-13; Mid-Size ILEC Comments at 24-25; Declaration of Julie Brown and Glen Hannum ¶ 5, attached hereto as Exhibit 2 ("Brown/Hannum Declaration").

[19] Letter from Charles McKee, Vice President, Government Affairs, Sprint Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 1-3 (filed Oct. 17, 2016).

[20] Fact Sheet, "Chairman Wheeler's Proposal to Promote Fairness, Competition, and Investment in the Business Data Services Market," at 3 (Oct. 7, 2016), *available at* https://www fcc.gov/document/chmn-wheelers-update-business-data-services-rules ("Fact Sheet"). Notwithstanding this correct conclusion, the Fact Sheet then ignores the fact that competitive Ethernet offerings also discipline prices and practices of legacy DSn offerings, as CenturyLink has explained. Letter from Russell P. Hanser & Brian W. Murray, Wilkinson Barker Knauer, LLP, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 8 (filed Oct. 28, 2016) ("CenturyLink Oct. 28 Letter").

[21] *See generally* CenturyLink Oct. 28 Letter at 1-13.

benchmark to discipline rates "provides sellers with substantial flexibility to set rates"[22] – a paradoxical assertion given that the very purpose of a benchmark is to foreclose such flexibility. CenturyLink has explained that Ethernet benchmarking proposals would result in extreme and arbitrary rate reductions – cuts of between 37 and 89 percent for the standard Ethernet rates in the company's eight interstate service guides, with a company-wide weighted average reduction of these standard rates of 49 percent.[23] There can be no reasonable doubt about the ultimate outcome of such draconian revenue losses: the crumbling of the already-challenging business case for pursuing new infrastructure deployment, undermining the Commission's broadband and universal service objectives. These consequences should not be taken lightly, and the Commission should not invite them by adopting or even considering misguided Ethernet benchmarking proposals.

The Commission should reject calls for a "fresh look" opportunity following its decision, and in all events must apply any "fresh look" equally to all parties involved, not just purchasers of BDS offerings. The Commission should not allow purchasers to void or modify their contractual obligations through a fresh look.[24] An agency may not nullify contractual obligations if doing so would be contrary to the public interest.[25] The Commission has thus recognized that a fresh look opportunity is an "extraordinary remedy" granted only in "limited circumstances."[26] Accordingly, the Commission has been extremely reluctant to nullify contracts even when the parties have entered into term commitments – a core component of arguments favoring a "fresh look" here.[27] For example, the Commission has found that it would be inappropriate to grant a "windfall" to entities who "entered long-term arrangements in exchange for lower prices" when others "avoided the risk of early termination fees by electing shorter contract periods at higher prices."[28] Verizon has correctly pointed out that allowing

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[22] Letter from Jennifer Bagg, Harris, Wiltshire & Grannis LLP, Counsel for Sprint Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 2 (filed Oct. 5, 2016).

[23] CenturyLink Sept. 30 Letter at 5-7.

[24] *See* Letter from Jennifer P. Bagg, Harris, Wiltshire & Grannis LLP, Counsel to Sprint Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-143 *et al.*, at 16 (filed Sept. 28, 2016).

[25] *See Direct Access to the INTELSAT System*, Report and Order, 14 FCC Rcd 15703, 15752 ¶ 119 (1999). *See generally Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956) (noting that "while it may be that [a regulator] may not normally *impose* upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain").

[26] *Direct Access to the INTELSAT System*, 14 FCC Rcd at 15751 ¶ 118.

[27] *See, e.g.*, Comments of Birch, BT Americas, EarthLink, and Level 3, WC Docket No. 05-25, at 105 (filed Jan. 22, 2016).

[28] *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 ¶ 815 (2011).

purchasers to reduce their volume commitments at their option would have the same effect.[29] Moreover, the Commission has already taken measures to amend ILECs' existing tariffs and plans in the *Tariff Investigation Order*. It would therefore be unnecessary and inappropriate for the Commission to allow BDS purchasers to automatically capitalize on the Commission's new framework by seizing the benefits of immediate pricing reductions while walking away from contracts they do not like. Accordingly, any new rules concerning the rates, terms, or conditions for the provision of BDS should apply only to contracts entered into after the effective date of the new rules.

To the extent the Commission *does* impose a fresh look requirement, that opportunity should be reciprocal to balance the interests of all parties. The Commission has explained that a fresh look "is a very rare occurrence" because "restructuring [existing] contracts may be unfair to both incumbent LECs and other competitors."[30] If BDS purchasers might not have entered into an agreement had they known that rate reductions were in the offing, it is also true that BDS sellers almost certainly would not have agreed to certain terms – in particular, discounts off of the tariffed rates – had they known that those tariffed rates would soon be subject to substantial mandatory cuts. As a matter of fundamental fairness, if changed regulatory circumstances warrant an opportunity to abrogate an existing agreement, then that must be true for *all* affected parties. A contrary approach would functionally grant BDS purchasers a unilateral at-will termination clause – an act which scholars have noted renders the very underpinning promise of a contract "illusory."[31]

There is no legal or policy basis for the "parity pricing" rule proposed by Windstream and INCOMPAS. Windstream and other parties have proposed that the Commission impose an unprecedented, unlawful, asymmetric requirement on ILECs to provide BDS inputs to resellers at rates reflecting the incremental cost that the provider purportedly avoids by provisioning the wholesale product instead of the final retail product.[32] This wholesale discount proposal, referred to as the "parity pricing rule," is both legally and factually unsupported, and inconsistent

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[29] *See* Letter from Maggie McCready, Vice President, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 4-5 (filed Sept. 12, 2016).

[30] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order, Order on Remand, and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17401 ¶ 694 (2003).

[31] E. Allan Farnsworth, Contracts 80 § 2.14 (Richard A. Epstein *et al.* eds., 2d ed. 1990); *see also* Restatement (Second) of Contracts § 77 cmt. a (1981) (promises that make "performance entirely optional … do not constitute a promise," and such illusory promises are not valid consideration).

[32] *See, e.g.*, Reply Comments of Windstream Services, LLC on the Further Notice of Proposed Rulemaking, WC Docket Nos. 16-143 *et al.*, at 28-46 (filed Aug. 9, 2016) ("Windstream Reply Comments"); Comments of Windstream Services, LLC on the Further Notice of Proposed Rulemaking, WC Docket Nos. 16-143 *et al.*, at 39-44 (filed June 28, 2016) ("Windstream Comments").

with long-standing doctrine concerning alleged price squeezes.[33] It would also impose undue administrative costs to implement.

First, the Commission has no legal authority to impose a wholesale pricing rule on BDS offerings. Windstream and other parties cite Sections 201, 202, 251(b)(1) and 251(c)(4) of the Act as bases for the requested requirement.[34] None of these provisions authorizes such action in these circumstances. The Commission has never held that Section 201 or 202 provides authority to mandate wholesale discounts for generally available services. To the contrary, those provisions prohibit "use restrictions" that would limit price terms to wholesale (as opposed to retail) customers.[35] That is, under Sections 201 and 202, a carrier may not offer a service generally at one price while making the very same service available only to carriers for resale at a lower price.[36] Windstream claims that the proposed rule is not a use restriction, but it does not explain how the rule could be applied without restricting the lower price to one category of customers for only one possible use – *i.e.*, to carriers for resale – while denying that price to all other customers of the very same service.[37] Windstream also fails to recognize the difficulty of enforcing such a restriction in the case of identical services offered to different categories of customers, including burdensome auditing of wholesale customers' use of services.

Section 251 also offers no support for a parity pricing rule. Section 251(b)(1), which imposes a duty on all LECs not to prohibit or "impose unreasonable or discriminatory" restrictions on resale,[38] does not authorize any wholesale pricing requirement.[39] Section

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[33] *See* Windstream Reply Comments at 28.

[34] *See, e.g., id.* at 38, 44; Windstream Comments at 39 & n.122.

[35] *See, e.g., Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 104 F.C.C. 2d 958, 1042 ¶ 165 (1986) (prohibiting carriers from "restrict[ing] the availability of CEI [comparably efficient interconnection] to any particular class of customer or enhanced service competitor" because such restrictions are "anticompetitive discrimination"); AT&T Reply Comments at 56-58; Comments of AT&T Inc., WC Docket Nos. 16-143 *et al.*, at 66-67 & n.187 (filed June 28, 2016) ("AT&T Comments").

[36] *See MCI Telecommunications Corp. v. Am. Tel. & Tel. Co. and the Pacific Tel. & Tel. Co.*, Memorandum Opinion and Order, 94 F.C.C. 2d 360, 391-92 ¶¶ 97-100 (ALJ Chachkin 1981) (finding that use restriction based on whether service was purchased for resale violated Sections 201 and 202) ("*MCI v. AT&T*").

[37] The rule Windstream seeks would effectuate a regime no different from that invalidated in the MCI case cited by Windstream. *See* Windstream Reply Comments at 41 n.136. The regime there precluded a restriction denying service to any customer that "was not the ultimate user of the service." *MCI v. AT&T*, 94 F.C.C.2d at 391 ¶ 98. The rule Windstream seeks here would be the inverse, denying the lower-priced service to any entity that *was* the ultimate user.

[38] 47 U.S.C. § 251(b)(1).

[39] *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19460 ¶ 89 (2005), *aff'd sub nom. Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15981 ¶ 976 (1996) ("*Local Competition Order*") (subsequent history omitted).

251(c)(4) requires ILECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers,"[40] but the Commission has held that this provision does not apply to access services, which are predominantly wholesale in nature and thus do not "involve an appreciable level of avoided costs that could be used to generate a wholesale rate."[41] Windstream contends that the Commission subsequently amended its rules to apply the wholesale discount requirement to "advanced services," irrespective of whether they are access services, if such services are sold on a retail basis to residential and business end-users. In fact, the Commission took a more nuanced approach. Rather than applying Section 251(c)(4) automatically to all "advanced services" also sold on a retail basis, the Commission observed that "section 251(c)(4) requires a fact specific evaluation of the features and characteristics of a particular transaction"[42] to ensure that the Section 251(c)(4) wholesale discount applies "only to services targeted to end-user subscribers."[43] For example, because the ILECs' DSL services designed for and targeted to ISPs do not incur retail costs, they "would not avoid any appreciable level of retail costs associated with providing … typical retail functions for the ultimate end-user" and thus should not be subject to the wholesale discount obligation."[44] Similarly, the BDS offerings at issue here are often targeted to resellers in the first instance.[45]

Second, there is no factual basis for Windstream's claims of a "price squeeze." Windstream's attempt to demonstrate a wholesale/retail BDS price squeeze is undermined by its reliance on "Guidebook" "rack" rates, rather than the negotiated rates carriers actually pay. Moreover, Windstream appears to be comparing bare Ethernet inputs with end-to-end Ethernet services, which include additional elements, such as multiplexing. It also tries to compare different types of service offered at different locations. These apples-to-oranges comparisons cannot support a price squeeze claim.[46] This is particularly problematic because, in comparing

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[40] 47 U.S.C. § 251(c)(4)(A).

[41] *Local Competition Order*, 11 FCC Rcd at 15935 ¶ 874.

[42] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd 19237, 19238 ¶ 3 (1999), *aff'd sub nom. Ass'n of Communications Enterprises v. FCC*, 253 F.3d 29 (D.C. Cir. 2001).

[43] *Id.* at 19245 ¶ 17.

[44] *Id.*

[45] *See* Brown/Hannum Declaration ¶ 4 ("CenturyLink sells Metro Ethernet services predominately to wholesale customers, but also to some retail customers."). While CenturyLink incurs mostly the same costs in providing Ethernet services to wholesale and retail customers, it incurs some additional costs that are unique to wholesale or retail customers, respectively. For example, Ms. Brown and Mr. Hannum note that "CenturyLink engages in marketing for both types of customers, but that marketing differs between customers." *Id.* CenturyLink also uses different sales and customer care models, billing systems and operational support based on the divergent services typically sought by wholesale and retail customers. *Id.* CenturyLink thus avoids no significant costs when selling these services to wholesale customers, and any costs CenturyLink does avoid are offset by wholesale-specific costs.

[46] Mid-Size ILEC Reply Comments at 58.

only the transmission prices, Windstream fails to appreciate that the revenue models for retail and wholesale service differ significantly, forcing CenturyLink to allocate more of its cost-recovery to transmission for wholesale than for retail service.[47] When CenturyLink sells a BDS offering to a reseller, the reseller typically seeks only transmission, meaning that CenturyLink must recoup its costs exclusively through the rate for transmission.[48] When it sells BDS to a retail customer, that customer often pairs the service purchase with related over-the-top offering purchases from CenturyLink, allowing CenturyLink to spread the associated costs across the suite of services.[49] In this scenario, the rate associated with retail transmission might equal (or fall shy of) the wholesale transmission rate, but the total revenues still would exceed the total revenues collected from a wholesale customer.

Windstream also has failed to demonstrate other doctrinal prerequisites for identifying an actionable price squeeze. As Windstream's declarant concedes, the parity pricing requirement is designed for a vertically integrated entity *with market power*.[50] Under antitrust law,[51] no actionable claim is stated where an entity lacking market power charges a wholesale price above its non-predatory retail price.[52] Thus, when faced with price-squeeze claims, the Commission has required a showing that "a vertically integrated company which has *monopoly power* at the wholesale level … sets its [monopoly] wholesale rates so high that its wholesale customers are unable to compete in the retail market."[53] Here, however, ILECs lack the market power to increase Ethernet and other BDS rates charged to other carriers above their costs. Even as of 2013, non-ILECs had a greater overall market share for BDS than ILECs and represent six of the top nine providers in terms of port share.[54] Today, the majority of new Ethernet ports are captured by non-ILECs.[55] There is no record evidence that any provider of BDS with speeds

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[47] *See* Brown/Hannum Declaration ¶ 6.

[48] *Id.*

[49] *Id.* Cox has noted that the absence of these "add-on" services "pressures the revenue that could be used to recoup construction costs," because Cox then "must recover its costs solely from the price of [the] BDS transport connection." Comments of Cox Communications, Inc., WC Docket No. 16-143, at 13 (filed June 28, 2016).

[50] *See* Windstream Reply Comments, Att. B, Declaration of Robert D. Willig ¶ 20 (Aug. 8, 2016).

[51] The Commission has recognized that the price squeeze concept "developed as a complaint under antitrust law and was eventually applied in the area of regulated commerce." *Joint Application by SBC Communications Inc. et al. for Provision of In-Region, InterLATA Services in Kansas and Oklahoma* , Order on Remand, 2003 FCC LEXIS 6338 *9 ¶ 7 (2003).

[52] *See Pacific Bell Tel. Co. v. linkLine Communications*, 555 U.S. 438, 451-52 (2009) (no actionable price squeeze claim under the Sherman Act in the absence of monopoly power).

[53] *INFONXX, Inc. v. New York Tel. Co.*, Memorandum Opinion and Order, 13 FCC Rcd 3589, 3598 ¶ 18 (1997) (emphasis added).

[54] AT&T Reply Comments at 58.

[55] *See* Vertical Systems Group Mid-Year 2016 Ethernet Leaderboard (Aug. 18, 2016), http://www.verticalsystems.com/vsglb/mid-year-2016-u-s-carrier-ethernet-leaderboard/.

over 45 Mbps has market power. Indeed, according to the Fact Sheet, because of the "evidence of emerging competition and falling prices," no provider of Ethernet or other BDS delivering speeds over 45 Mbps can be considered "dominant."[56] This fact alone dooms any claim of an actionable price squeeze.

Indeed, the Commission has rightly doubted the economic feasibility of the price squeeze as a means of increasing profits in this sector. "In telecommunications … the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed."[57] Such behavior would require an ILEC to incur a loss or sacrifice short-run profit in the hopes that it could recoup those losses in the long run by raising prices above a competitive level after it had driven rivals from the market. This is an extremely unlikely scenario, particularly where the Commission stands ready to intervene and regulate rates if the market becomes less competitive.[58] Thus, even where nondominant wholesale rates equal or exceed retail rates for like services, that gap does not necessarily demonstrate an anticompetitive price squeeze. In this particular case, as noted above, it reflects instead the opportunity cost of providing wholesale service – namely, the lost opportunity to sell a retail customer complementary products along with the retail BDS. Windstream and its expert, Professor Willig, overlook this complementary product opportunity cost in arguing that the retail price must always exceed the wholesale price. That additional opportunity cost thus can justify a wholesale price higher than the retail price.

Finally, the parity pricing rule proposed by Windstream would impose substantial administrative costs on providers and the Commission alike. Developing such a rule would require burdensome, massive cost studies, which would be made even more difficult by the similarity of wholesale and retail BDS costs. Determining retail prices is also difficult, given that BDS are often sold as part of a package with other offerings. Windstream's proposed wholesale discount "safe harbor" of 18 percent is based on its own cost structure, which has no bearing on a possible ILEC wholesale BDS discount calculation.[59] Furthermore, the individualized, multi-faceted negotiations needed to hammer out BDS agreements with carriers and large users would be disrupted by an arbitrary one-size-fits-all rule. Requiring that a carrier always price any BDS offered to another carrier for resale based on its lowest price for the same service charged to a non-carrier or some set percentage difference would preclude parties from

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[56] Fact Sheet at 2-3. *See also* Letter from Curtis L. Groves, Assistant General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-143, at 2-3 (filed Oct. 31, 2016) ("Verizon Oct. 31 Ex Parte").

[57] *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14264 ¶ 80 (1999) ("*Pricing Flexibility Order*"), *aff'd sub nom. WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

[58] *See* Verizon Oct. 31 Ex Parte at 4 and *id.* at Att. A, Declaration of J. Gregory Sidak on Behalf of Verizon ¶¶ 18-20 (Oct. 31, 2016) ("Sidak Decl.").

[59] Verizon Oct. 31 Ex Parte at 5-7 and Sidak Decl. ¶¶ 30-31.

taking into account any other considerations in negotiating rates and terms, especially for multi-service agreements.

The Commission must sunset the* Emerging Wireline Order*'s interim wholesale access requirement. Windstream's effort to transform the *Emerging Wireline Order*'s *interim* wholesale access requirement into a *permanent* mandate contradicts the requirement's rationale and should be denied. In that order, the Commission repeatedly stressed that the wholesale access requirement was intended to govern only "while the Commission grapple[d] with longer-term questions" – *i.e.*, "only until the special access proceeding is resolved."[60] The requirement was meant only to "limit potential temporary disruptions" by "bridging the gap until the Commission's special access proceeding is complete."[61] As such, the Commission emphasized that the interim requirement would be lifted once "(1) it identifies a set of rules and/or policies that will ensure rates, terms, and conditions for special access services are just and reasonable; (2) it provides notice such rules are effective in the Federal Register; and (3) such rules and/or policies become effective."[62]

Here, Windstream attempts to turn the Commission's framework on its head, arguing that the wholesale access rule should remain in place even *after* the agency has resolved the relevant questions in the instant dockets and implemented "a set of rules and/or policies that will ensure rates, terms, and conditions for special access services are just and reasonable."[63] Windstream's rationale, in summary, is that it would disagree with any conclusion that the rules the Commission ultimately adopts will ensure just and reasonable rates.[64] For example, it argues that the complaint process set out in the Fact Sheet "does not provide an adequate basis" for ensuring that rates are just and reasonable.[65] But Windstream's argument misses the mark. First, to state the obvious, what matters for purposes of sunsetting the interim rule is whether *the Commission* concludes that its regime will ensure lawful rates (whether through the application of market forces, rate regulation, or both), not whether Windstream so concludes. CenturyLink presumes that whatever order the Commission adopts here will reflect the agency's view as to what is or is not necessary to guarantee lawful rates. Windstream might disagree with the Commission's conclusions (as might CenturyLink), but that fact does not provide any basis for eschewing the agency's commitment to retiring the requirement upon the effectiveness of a new BDS regime. Second, there is no way for the Commission to draft a sustainable decision that reflects Windstream's view on this issue. To do so, it would need to simultaneously (1) explain

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[60] *Technology Transitions*, Report and Order, 30 FCC Rcd 9372, 9443 ¶ 131 (2015) ("*Emerging Wireline Order*").

[61] *Id.* at 9447-48 ¶¶ 136-37.

[62] *Id.* at 9443 ¶ 132.

[63] *Id.*

[64] *See* Windstream Oct. 17 Letter at 15-17.

[65] *See id.* at 16-17.

why the rules adopted serve the public interest by ensuring that BDS rates are just and reasonable and (2) explain that the rules fail to ensure this result, necessitating permanent application of the "interim" rule. The Commission cannot, of course, contradict itself in this manner.[66] To the extent it makes a finding that ILECs lack market power in a specific market segment, or adopts rules to address any market power it perceives, it must eliminate the interim requirement as planned.

* * *

Please contact the undersigned with any questions.

Sincerely,

/s/ Jeffrey S. Lanning

[66] Internally contradictory agency reasoning renders resulting actions arbitrary and capricious. *See, e.g., Air Line Pilots Ass'n v. United States Dep't of Transp.*, 3 F.3d 449, 453 (D.C. Cir. 1993) (holding agency decision arbitrary and capricious because it was "internally inconsistent"); *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (same).

EXHIBIT 1

REDACTED

EXHIBIT 2

REDACTED – FOR PUBLIC INSPECTION

DECLARATION OF JULIE BROWN AND GLEN HANNUM

1. My name is Julie Brown. My business address is 930 15th Street, Denver, Colorado, 80202. I am employed as a Director of Wholesale Pricing, Marketing and Training in CenturyLink's Wholesale Markets Group. In that capacity, I am responsible for all strategic and transactional pricing for data and voice products, including Metro Ethernet, within the Wholesale Markets group. I have been employed by CenturyLink and its predecessor companies for 15 years, holding positions in Wholesale Product and Pricing and Offer Management.

2. My name is Glen Hannum. My business address is 930 15th Street, Denver, CO, 80202. I am employed as a Director of Retail Pricing and Offer Management. In this position, I am responsible for strategic pricing, and setting guidelines for evaluating non-standard pricing. I have been employed by CenturyLink and its predecessor companies for 19 years.

3. In this declaration, we address the similarities and differences between the Ethernet services that CenturyLink sells to wholesale and retail customers. We also note the ongoing pricing compression for Ethernet services of all types and the differences in the business case for Ethernet services sold to wholesale and retail customers.

4. CenturyLink sells Metro Ethernet services predominately to wholesale customers, but also to some retail customers. In many ways, the Ethernet services CenturyLink sells to wholesale and retail customers are identical. In particular, they are provided over the same network and utilize the same provisioning process. But in other ways they are different. For example, while CenturyLink employs sales personnel and dedicated account teams to serve both

wholesale and large retail customers,[1] those wholesale and retail employees reside in different CenturyLink business units and use different sales and customer care models, billing systems and operational support based on the divergent services typically sought by wholesale and retail customers. Similarly, CenturyLink engages in marketing for both types of customers, but that marketing differs between the two types of customers. Thus, CenturyLink incurs mostly the same costs in providing Ethernet services to wholesale and retail customers, but incurs some additional costs that are unique to wholesale or retail customers, respectively. CenturyLink's wholesale affiliate provides wholesale Ethernet services to its retail affiliate on the same rates, terms, and condition as it offer those services to unaffiliated wholesale customers. All of these customers, whether affiliated or unaffiliated, must pay for network-to-network interfaces (NNIs) as well and manage any functionalities necessary to provide finished services to end user customers.

5. Over the past several years, CenturyLink has witnessed tremendous pricing compression for Ethernet services sold to both wholesale and retail customers. That compression continues today. Wholesale customers can now buy Ethernet services in most areas from a variety of non-ILEC providers, including cable companies, facilities-based CLECs, dark fiber providers such as Zayo, and CLECs providing low-cost Ethernet-over-copper solutions. As a result, market pressure has forced CenturyLink to reduce its Ethernet rates for wholesale customers significantly and repeatedly. All Ethernet providers also compete for retail customers, leading to falling Ethernet prices for these customers as well. The result is that CenturyLink and other

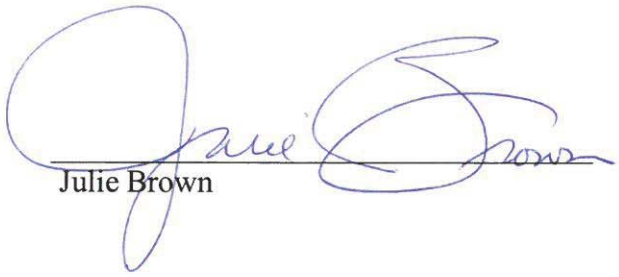
[1] Smaller retail customers generally do not have dedicated account representatives.

Ethernet providers face lower margins for Ethernet services, as competition drives prices for these services closer to the cost of providing them.

6. Despite the similarities between the Ethernet services CenturyLink sells to wholesale and retail customers, there are also major differences in the way CenturyLink views those customers. Wholesale customers typically purchase standalone transmission service from CenturyLink, while retail customers often buy additional services that ride on top of that transmission service and are bundled in the total service offer. This dramatically alters the business case for the two types of services. For wholesale customers, the cost of providing the Metro Ethernet service generally must be recovered solely from the price paid for the Ethernet service based upon the specific term committed. In contrast, the cost of providing Ethernet to retail customers can be recovered through the price paid for the Ethernet service *and* for any additional CenturyLink services that ride on the Ethernet service. Thus, the cost of providing Ethernet essentially is shared across the package of services (including Ethernet) sold to the retail customer. From this perspective, the cost of providing Ethernet service is evaluated in the overall total service financials to determine the acceptable return requirements. Hence, in many cases, revenues from additional retail services effectively offset some of the financial burden of the Ethernet component, which creates a major difference from the wholesale business model.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: November 9th, 2016



Julie Brown

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: November 9, 2016

Glen Hannum